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# SEC Grants Reprieve to "Lame Duck" WKSIs

On January 26, 2009, the SEC released Compliance and Disclosure Interpretations on a number of issues under the Securities Act of 1933 (the Securities Act). One key issue covered in this release (in Question No. 198.06 under Securities Act Rule 401) involves new transition guidance provided for issuers that currently have in place an effective automatic shelf registration statement on Form S-3, but will lose their eligibility for automatic shelf registrations immediately upon filing their Form 10-K because they will no longer qualify as a well-known seasoned issuer (or WKSI). This guidance supersedes information previously received from the SEC Staff indicating that such issuers would have to wait until a replacement Form S-3 was declared "effective" before they could commence any new take downs under their shelf registration.

### What is a WKSI?

Registrants that qualify as WKSIs under SEC rules are eligible to file shelf registration statements on Form S-3 that become effective immediately upon filing, avoiding the potentially significant delays involved in the traditional SEC Staff review and comment process. These automatic shelf registration statements will generally remain continuously effective for three years after their initial filing date.

In order to qualify as a WKSI, a domestic registrant must, among other things, as of a date within 60 days of its most recent "determination date":

have a public float of \$700 million or more for its voting and non-voting common equity; or

have issued within the last 3 years at least \$1 billion aggregate principal amount of non-convertible securities, excluding common equity, in primary

offerings for cash (not exchange) registered under the Securities Act, and must plan to register only additional amounts of such non-convertible securities (subject to additional requirements).

The relevant "determination date" for a new automatic shelf registration is the date on which the registration statement is filed. For issuers with effective automatic shelf registrations on file, however, a new "determination date" generally occurs each year when the registrant files its Form 10-K, thus updating the prospectus for purposes of Securities Act Section 10(a)(3).

Due to the dramatic declines experienced in the stock market in recent months, many registrants that qualified as WKSIs when they filed their most recent automatic shelf registrations will no longer satisfy the public float requirement - and thus will lose their WKSI status - upon the filing of their annual report on Form 10-K for their most recent fiscal year. Absent SEC relief, these registrants would not be able to utilize their shelf registrations to access the capital markets between the "determination date" on which they lose their WKSI status and the date on which they are able to have a replacement, non-automatic shelf registration statement declared effective by the SEC.

### **What relief is available for WKSIs losing their automatic shelf registrations?**

The SEC has laid out a two-step process - involving two separate post-effective amendments to an existing automatic shelf registration - that will allow registrants that will lose their WKSI status when they file their Form 10-K to remain eligible to conduct primary offerings under Form S-3 General Instructions I.B.1 (for issuers with public common equity float of at least \$75 million) or I.B.2 (for offerings of only non-convertible "investment grade securities" as defined therein), pending the conversion of their automatic shelf registration to a conventional registration statement on Form S-3. Provided they otherwise continue to meet the requirements for use of Form S-3, the SEC's guidance states that these registrants may continue to offer and sell securities using their automatic shelf registration statements while their replacement filing is under review if they follow the following procedures:

1. *Prior to the filing of the registrant's Form 10-K:* The registrant must file a post-effective amendment to its current automatic shelf registration statement (that will become effective immediately), which must both (A) register a specific amount of specified securities and pay the associated SEC filing fee and (B) add - to the extent not already included in the base prospectus - all the information that is allowed to be omitted from the base prospectus included in an automatic shelf registration statement in reliance on Securities Act Rule 430B (including a full description of the offered securities, the plan of distribution, whether the offering is a primary or secondary offering, and (if applicable) the identification of selling security holders). The SEC's guidance states that this first post-effective amendment should be filed using EDGAR submission type POSASR.

- Promptly following the filing of the registrant's Form 10-K:* The registrant must complete the conversion of its shelf registration by filing either (A) a second post-effective amendment (using EDGAR submission type POS AM) or (B) a new Form S-3 registration statement (using EDGAR submission type S-3), the contents of which in either case may be nearly identical to the post-effective amendment filed prior to the filing of the Form 10-K, but must fully conform to the SEC's requirements for a non-automatic shelf registration statement on Form S-3. Pending the effectiveness of this filing (which will be subject to review and comment by the SEC Staff), the registrant may continue to offer and sell securities using its amended automatic shelf registration statement.

Since the first step in this process must be accomplished *before* the registrant files its annual report on Form 10-K, it is critically important that companies facing this issue take action immediately if they are to avoid an interruption in their access to the public capital markets following their loss of WKSI status. If you have any questions about these or any other Securities matters, please contact one of the following attorneys:

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